(1)

90-1007

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Petitioner,

v.

SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO
Respondent.

(GEORGE WALTERS, REAL PARTY IN INTEREST)

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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QUESTION PRESENTED

1. Whether state law claims brought by an officer of a national bank are preempted and barred by the dismissal provisions of the National Bank Act where the officer was appointed by the Board of Directors and terminated by a duly authorized delegate of the Board of Directors.

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

The petitioner respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, First Appellate District, filed on July 17, 1990.

OPINIONS BELOW

The opinion of the Superior Court for the City and County of San Francisco denying Petitioner's Motion for Summary Judgment was not reported. A copy of the Order is attached to this Petition as Appendix A.

The opinion of the California Court of Appeal denying the Petition for Writ of Mandate was not reported. A copy of the Order is attached to this Petition as Appendix B.

The California Supreme Court denied review of the Order of the Court of Appeal in this matter on September 6, 1990. A copy of the Order of Denial is attached to this Petition as Appendix C.

JURISDICTION

The order of the Superior Court of the City and County of San Francisco was filed on May 15, 1990. The order of the California Court of Appeal was filed on July 17, 1990. The California Supreme Court denied review on September 6, 1990, at which time the opinion of the Superior Court became final and reviewable by this Court. California Rules of Court, rules 24(a), 25(a), 28(f). This Petition for Writ of Certiorari followed within 90 days of the latter date. Supreme Court Rules, Rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).[1]

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[1] In *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963), the U.S. Supreme Court considered whether it had jurisdiction over a state court's interpretation of the venue provisions of the National Bank Act. The state court's interpretation did not preclude the Bank from prevailing on the merits of the claims against it. However, because the issue presented involved a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." the U.S. Supreme Court decided that it would serve "the policy underlying the requirement of finality" to adjudicate the state court's interpretation of the National Bank Act *before* the case proceeded to a full trial on the merits. *Id.* at 558. *See also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-84 (1974).

The instant case also involves an interpretation of the National Bank Act on an issue that is "separate and independent" from the merits of Plaintiff's claims. Furthermore, adjudication of this claim at this time could eliminate "long and complex litigation" which would "be for naught" if the state court's interpretation of the National Bank Act is held to be incorrect. *Mercantile National Bank, supra*, at 558. Accordingly, it is appropriate for the court to exercise jurisdiction over this issue at this time.

FEDERAL STATUTE INVOLVED

The National Bank Act, 12 U.S.C § 24 provides, in pertinent part:

> [A] national banking association . . . shall have power . . . .
>
> * * *
>
> Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.
>
> Sixth. To prescribe, by its board of directors, bylaws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

STATEMENT OF THE CASE

A. Procedural History.

On October 9, 1987, George Walters filed a Complaint in the Superior Court for the City and County of San Francisco alleging the following causes of action:

a. First Cause of Action—Misrepresentation, Fraud, Deceit.

b. Second Cause of Action—Breach of Statutory Obligation (Labor Code §§ 970 and 972).

c. Third Cause of Action—Tortious Breach of Covenant of Good Faith and Fair Dealing.

d. Fourth Cause of Action—Breach of Oral Contract.

e. Fifth Cause of Action—Breach of Implied in Fact Promise.

f. Sixth Cause of Action—Wrongful Termination/ Discharge.

g. Seventh Cause of Action—Breach of Statutory Obligation (Labor Code §§ 201 and 203).

h. Eighth Cause of Action—Intentional Infliction of Emotional Distress.

i. Ninth Cause of Action—Negligent Infliction of Emotional Distress.

After filing responsive pleadings and engaging in discovery, Petitioner filed a Motion for Summary Adjudication of Issues, pursuant to California Code of Civil Procedure 437c, seeking dismissal of the first, second, third, fourth, fifth, sixth, eighth, and ninth causes of action. In this motion, Petitioner contended that the National Bank Act preempted and barred Walters' claims.

Judge Poliak of the Superior Court denied summary adjudication of all issues presented in the Bank's motion. The only basis for the court's ruling was that the Bank's " . . . moving papers fail to establish that the termination of plaintiff was approved or ratified by the Board of Directors or an Executive Committee of the Board, so that the termination does not come under the National Bank Act, 12 U.S.C. Section 24 (Fifth)." (See Appendix A.)

Petitioner sought review of this Order by a Petition for Writ of Mandate filed April 24, 1990. On July 17, 1990, after requesting and receiving opposition and reply papers from the parties, the Court of Appeal summarily denied the Writ. (See Appendix B.) On July 27, 1990, Petitioner sought review of the Court of Appeal Order. The California Supreme Court denied review by Order dated September 6, 1990. (See Appendix C.)

B. Statement of Facts.

Walters was hired by Petitioner in March 1986. On April 29, 1986, the Board of Directors appointed Walters as an officer of the Bank with the title of Vice President. Walters continued to hold the officer title of Vice President until the termination of his employment.

Article V of Petitioner's Bylaws provide that "officers of the Association shall be . . . one or more Vice Presidents . . . " The

Bylaws also provide that "officers shall be appointed by the Board of Directors . . . and shall hold office at the pleasure of the Board . . . " Both of these provisions were in effect when Walters was made an officer of the Bank and when his employment was terminated.

On April 29, 1986, pursuant to Article V, Section 3 of the Bylaws,[2] the Bank's Board of Directors passed a resolution delegating authority to its Executive Vice Presidents "to demote, suspend, remove, or dismiss all officers and other employees beneath the rank of Executive Vice President".

In December 1986, Executive Vice President Clyde R. Claus decided to close the unit in which Walters worked and authorized the termination of Walters' employment. Accordingly, Walters was terminated at the direction of Mr. Claus effective February 17, 1987.

REASONS FOR GRANTING THE WRIT

The importance of the issues raised by this Petition cannot be overstated. At stake in this case for Petitioner as well as for every other national bank in California is the viability of the right to terminate officers "at will" granted by the National Bank Act, 12 U.S.C. 24 (Fifth) to federally chartered banks regardless of the state in which they are located. This right to dismiss officers at will reflects the conscious effort of Congress to ensure that federally chartered financial organizations have uniform power to deal immediately with employment related situations at the officer level.

A. The Decision of the Trial Court Frustrates the Purpose of the National Bank Act.

The trial court's decision in this case destroys Congress' effort to establish uniformity among national banks. It does so by

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[2] The pertinent part of Article V, Section 3 of the Bylaws reads as follows: 'The duties and authority of officers of the Association, other than as set forth in these Bylaws, shall be prescribed and established by the Board of Directors or the Executive Committee."

requiring national banks in California to show that the Board of Directors independently assessed and approved the termination of a Bank officer. Without such a showing, the at will standard of the National Bank Act cannot be invoked as a defense.

The imposition of this requirement distinguishes national banks doing business in California from national banks in the rest of the country.[3] Moreover, because the decision is a marked departure from the rulings of the federal courts, it gives bank officers suing in the California state courts more rights than officers suing in the California federal courts. Thus, officers discharged from the same bank in California would have different legal standards applied to their terminations depending upon the court in which they filed their claims. This eliminates any possibility of uniformity among the federally chartered banks and runs afoul of Congress' attempt to create one standard of employment for all bank officers.

Furthermore, in holding that an officer is not employed at will unless he is terminated by the Board of Directors, the trial court made an incorrect and dangerous assumption: that being an "officer" and being "at will" are severable concepts. This is simply not true. The National Bank Act does not empower banks to appoint officers to transact business who are not at will

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[3] See, e.g., *Mackey v. Pioneer National Bank*, 867 F.2d 520 (9th Cir. 1989); *Westervelt v. Mohrenstecher*, 76 F. 118 (8th Cir. 1896); *Holland v. Bank of America*, 673 F. Supp. 1511 (S.D. Cal. 1987); *Mahoney v. Crocker National Bank*, 571 F.Supp. 287 (N.D. Cal. 1983); *Kozlowsky v. Westminster National Bank*, 6 Cal. App.3d 593 (1970); *Cox v. First National Bank of Brea*, 10 Cal. App.2d 302 (1935); See also cases interpreting analogous federal statutes creating "at will" employment in other federally chartered financial institutions, *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093 (9th Cir. 1981), cert. den., 456 U.S. 948; *Inglis v. Feinerman*, 701 F.2d 97 (9th Cir. 1983), cert. den., 464 U.S. 1040; *Alegria v. Idaho First National Bank*, 723 P.2d 858 (Idaho 1986); *Ambro v. American National Bank & Trust Co. of Michigan*, 394 N.W.2d 46 (Mich.App. 1986); *McGeehan v. Bank of New Hampshire Nat. Ass'n*, 455 A.2d 1054 (New Hampshire 1983); *Kemper v. First National Bank in Newton*, 418 N.E.2d 819 (Ill.App. 1981).

employees.[4] Rather, being employed at will is a consequence of being employed as an officer of a national bank.

Under the trial court's reading of the Act, however, officers are limited to those individuals who are both appointed *and terminated* by the Board of Directors. Thus, officer status cannot be determined until the employee is terminated. By this analysis, an employee could be appointed an officer, transact business as an officer, commit the Bank to obligations as an officer, but not truly be an officer because his termination was not effected by direct action of the Board of Directors. All business transactions requiring officer approval entered into by this officer, therefore, would be subject to rescission or an ultra vires challenge. Thus, by prohibiting banks from conveying officer status until the moment of termination, the trial court's decision raises a dismaying array of possibilities which could impact the enforceability of existing agreements and commitments and raise challenges which could threaten the financial integrity of affected banks. This defeats the very purpose of the National Bank Act which is designed to enhance the financial security of financial institutions, not detract from it.

B. The Dismissal Powers Granted by the National Bank Act can be Delegated By the Board of Directors.

In this case, the trial court did not find any factual dispute as to whether Walters was an officer of the Bank. Rather, the motion was denied solely because the decision to terminate Walters' employment was made by a delegate of the Board of Directors. The court found that since the Board did not directly order the termination, the dismissal provisions of the National Bank Act could not be raised as a bar to Walters' claims.

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[4] In fact, the courts have consistently interpreted the National Bank Act as prohibiting national banks from entering into contracts with bank officers for any employment relationship other than one which is at will. *Mackey v. Pioneer National Bank, supra; Trujillo v. FDIC*, 3 IER Cases 38 (C.D. Cal. 1988); *Kozlowsky v. Westminster National Bank, supra; Cox v. First National Bank, supra; McGeehan v. Bank of New Hampshire, supra.*

This ruling directly contradicts well established precedent of the federal and state courts. These courts have allowed the boards of directors of national banks to delegate the power to terminate bank officers to other persons within corporate structure of the national bank. *Mackey v. Pioneer National Bank, supra,* 820 F.2d at 525 (bank officers may be hired directly or indirectly through delegation by the Board of Directors, and may be terminated "at will" by delegate of Board, in this case an Executive Committee of the Board); *Mahoney v. Crocker National Bank, supra,* 571 F.Supp. at 290-91 (board of directors may assign the right to dismiss officers at pleasure to other persons within the corporate structure); *Holland v. Bank of America,* 673 F.Supp. 1511, 1516 (S.D.Cal. 1987) (National Bank Act preempts plaintiff's claims even though a delegate of board of directors carries out appointments and dismissals).

The reasoning of these cases is sound and is supported by the express language of the National Bank Act. Section 24 (Sixth) provides that the Board may specify the manner in which "its officers are appointed . . . its general business conducted and the privileges granted to it by law exercised and enjoyed." Since no words of proscription are used, this language must be read as expansive.

One of the "privileges" granted to national banks is the right to terminate officers at pleasure. In this case, Petitioner's Board of Directors prescribed how the termination "privilege" would be exercised. In accordance with its bylaws, the Board passed a resolution granting to its Executive Vice Presidents the authority to terminate Bank officers. Since Petitioner established through undisputed facts that Walters' employment was terminated by an Executive Vice President who had delegated authority from the Board of Directors to dismiss Bank officers, the dismissal provisions of the National Bank Act were met and summary adjudication for Petitioner should have been granted. The trial court's failure to do so and the Court of Appeal's refusal to overturn this decision are inconsistent with established case law and statutory authority. Action by this court is necessary, therefore, to resolve this conflict and to restore uniformity to the interpretation of the National Bank Act among the state and federal courts.

CONCLUSION

The National Bank Act gives federally chartered banks the unfettered right to terminate officers at will. 12 U.S.C. 24 (Fifth). It also expressly allows the Board of Directors of such banks to specify the manner in which this right shall be exercised. 12 U.S.C. 24 (Sixth). The ruling of the Superior Court in this case not only ignores these provisions, but also implies an obligation that the Board of Directors review and approve every officer level termination. This requirement directly contradicts the clear language of the National Bank Act as well as the rulings of other state and federal courts on this same issue.

This clear break with the historical interpretation of the dismissal provisions of the National Bank Act cannot be allowed without destroying the very purpose of the Act: to ensure uniformity among federally chartered banks. There can be no such uniformity if California bank officers are subject to a different legal standard than officers in other states. Nor can there be uniformity if officers suing in state court have different rights from officers suing in federal courts under the same federal statute. This court, therefore, should seize this opportunity to resolve the conflict that has been created by the Superior Court's ruling in this case and restore a uniform interpretation of the National Bank Act. Accordingly, Petitioner respectfully requests that its Petition for a Writ of Certiorari be granted.

Dated: December 3, 1990

HELLER, EHRMAN, WHITE & MCAULIFFE

By PATRICIA K. GILLETTE
Attorney for Petitioner

Appendix A

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Superior Court Of The State Of California
City And County Of San Francisco

George Walters,
Plaintiff,

v.

Terry Roussel, et al.,
Defendants.

Case No. 882 567

Order Re Motion For Summary Adjudication Of Issues

The motion of defendant Bank of America NT & SA for summary adjudication came on regularly for hearing on February 23, 1990 in Department 8, the Honorable Stuart Pollack presiding. Patricia Radez appeared as attorney for defendant Bank of America NT & SA; Stephen M. Murphy appeared on behalf of plaintiff George Walters. Having reviewed the papers submitted by both sides and hearing oral argument,

IT IS HEREBY ORDERED that the motion of defendant Bank of America NT & SA for summary adjudication of issues be denied in its entirety. Defendant's moving papers fail to establish that the termination of plaintiff was approved or ratified by the Board of Directors or an Executive Committee of the Board, so that the termination does not come under the National Bank Act, 12 U.S.C. § 24 (fifth).

DATED: March 26, 1990

STUART R. POLLAK
Judge Of The Superior Court

Approved as to Form:

PATRICIA S. RADEZ
Attorney for Defendant
Bank of America, NT & SA

Appendix B

Court of Appeal of the State of California

in and for the

First Appellate District

Division One

No. A049425

San Francisco Superior Court 882567

Bank of America National Trust and Savings Assn.,
Petitioner,

vs.

Superior Court, San Francisco Co.,
Respondent,

George Walters,
Real Party in Interest.

[Filed July 17, 1990]

By the Court:

The petition for writ of mandate and request for stay are denied.

Dated July 17, 1990

RACANELLI, P. J.

Appendix C

No. A049425-S016761

In the Supreme Court
of the State of California

IN BANK

[Filed September 6, 1990]

Bank of America National Trust & Savings Assn.,
Petitioner,

v.

Superior Court of the County of San Francisco,
Respondent;

George Walters,
Real Party in Interest

Application for stay and petition for review DENIED.
Lucas, C.J. and Panelli, J. did not participate.

BROUSSARD
Acting Chief Justice

(2)

90-1007

No. _____

In The

Supreme Court of the United States

October Term, 1990

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

v.

SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

(GARY HASENSTAB, Real Party in Interest.)

Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Bank Act preempts claims of misrepresentation arising out of the hiring of an officer.

2. Whether the National Bank Act preempts tort causes of action unrelated to the term of an officer's employment.

3. Whether the National Bank Act preempts contract causes of action unrelated to the term of an officer's employment.

4. Whether the National Bank Act allows banks to breach express and implied contracts relating to the term of an officer's employment when the officer is terminated by someone other than the board of directors.

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In The

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

v.

SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

(GARY HASENSTAB, Real Party in Interest.)

Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District

BRIEF IN OPPOSITION

Real party in interest Gary Hasenstab respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the California Court of Appeal, First Appellate District, filed on July 17, 1990.

STATEMENT OF THE CASE

Real party in interest Gary Hasenstab is a securities broker. For eight years before joining Bank of America, he

enjoyed an increasingly successful career at Bateman Eichler, Hill Richards. He became the top producer of limited partnerships and in his last year earned approximately $200,000.

In 1985 and 1986 he was contacted by Terry Roussel, director of the Special Investment Group ("SIG") at Bank of America. Roussel made numerous representations to Hasenstab to induce him to work for SIG as a salesman of limited partnerships. These representations included statements that there were sufficient clients and product, that Hasenstab would earn $450,000-$550,000 in his first year, and that he would be employed a minimum of two years.

Based on these representations, Hasenstab left Bateman Eichler, Hill Richards and began work for SIG. During the nine months Hasenstab worked for SIG, there was virtually no product to sell. Instead of earning over $450,000, he earned only his base salary of $150,000. He also learned that many of Roussel's representations were untrue. Hasenstab was never told that his lofty title of vice president subjected his employment to the National Bank Act or that he was employed at the pleasure of the board of directors.

In December 1986 SIG was closed by Clyde Claus, an executive vice president. Hasenstab was terminated in February 1987 by vice president Brenda Thomas, allegedly at the direction of Claus, when he refused to sign a release. The board of directors did not participate in or ratify the termination.

SUMMARY OF ARGUMENT

The decision of the Superior Court is consistent with federal and state court precedent in requiring the board of directors, or an executive committee of the board, to make the decision to terminate an officer under the National Bank Act. In any event, since this case involves numerous contract and tort issues unrelated to the National Bank Act, the overall impact of any ruling by this Court will be minimal.

The decision of the Court of Appeal upholding the Superior Court consisted of one sentence and was unpublished. The decision therefore will have no precedential effect and does not justify this Court's involvement. Finally, the issues raised by the Petition are presently before the California Supreme Court so that any action by this Court will be premature.

REASONS FOR DENYING THE WRIT

A. The Trial Court's Ruling is Consistent with the Majority of Federal and State Court Decisions.

Several courts have ruled that an officer is not subject to the "at pleasure" provision of the National Bank Act unless the decision to terminate was made by the board of directors. In view of the drastic effect of the Act in allowing banks to breach contracts, both express and implied, these rulings are sound. The act was intended, not to give national banks the unrestricted right to breach its express contracts, but to allow banks to remove quickly any officer whose continued employment

"threatens immediate ruin to the institution." *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896). Requiring the board of directors to make the decision to terminate ensures that the termination is so significant to the financial integrity of the bank that the decision is made by the highest level of management.

In *Wiskotoni v. Michigan Nat. Bank-West*, 716 F.2d 378, 38 (6th Cir.1983), the court stated:

> The terms of section 24 (Fifth) require that officers be appointed and dismissed by a national bank's board of directors. Wiskotoni was neither appointed nor dismissed by the Bank's board. Wiskotoni was hired by . . . [the] president of the Bank. The decision to terminate was made by . . . the successor president of the Bank. . . . [T]he board . . . took no official action until . . . when on the eve of oral argument on this issue before the district court, it passed a resolution purportedly ratifying Wiskotoni's dismissal. . . . For these reasons Wiskotoni was not an officer of the Bank for purposes of the National Bank Act.

Wiskotoni was followed by the Oregon Court of Appeal in *McWhorter v. First Interstate Bank*, 81 Or. 132, 724 P.2d 877 (1986), which observed that the

> authority to hire and fire officers of national banks is *not* simply a matter of corporate organization; it is a matter which Congress has deemed sufficiently important to regulate by statute.

Id. at 135, 724 P.2d at 879. The court further noted:

> Section 24 (Fifth) explicitly confers the responsibility for the hiring and dismissal of officers *on the board of directors*. Other provisions of the

> National Banking Laws make it clear that Congress knows how to manifest its intent about what powers are exercisable only by the board and what powers may be exercised by subordinate entities. *See, e.g.*, 12 U.S.C. § 24, (Seventh) ("board of directors *or duly authorized officers or agents*"). [Emphasis added]. Defendant's argument rests on the premise that the board may divest itself of a duty that Congress has placed on it by enacting a by-law which makes no reference to that duty but which, if there were no statute, *might* be sufficient under general corporation law principles to confer hiring and firing authority on the president.

Id.

In *Mackey v. Pioneer National Bank*, 867 F.2d 520 (9th Cir. 1989), a case relied on by Bank of America, the plaintiff was terminated by unanimous vote of the executive committee of the Board of Directors. The full board subsequently ratified that decision. The Ninth Circuit distinguished *McWhorter, supra*, by stating:

> there is no question that Mackey's firing was accomplished by the Board of Directors acting through its Executive Committee, . . . and not by the individual action of Pioneer's President.

Id. at 525.

In allowing an executive committee of the board to terminate officers with board ratification, *Mackey* provides a middle ground between the board itself and officers who have been delegated the responsibility to terminate. Although the executive committee is not the board itself, it is comprised of board members. Thus, at least some of the highest decision makers in the bank are participating in the decision.

Despite Petitioner's arguments to the contrary, the superior court's decision is consistent with *Mackey v. Pioneer National Bank*, 867 F.2d 520 (9th Cir. 1989). The superior court denied Petitioner's motion for summary adjudication because there was no evidence that "the termination of plaintiff was approved or ratified by the Board of Directors or an Executive Committee of the Board." (Pet.app.A.) Since *Mackey* was decided by the Ninth Circuit, the highest federal court in California, Real Party has been granted no more power by suing in state court than he would have had in federal court. Petitioner's claim that "officers discharged from the same bank in California would have different legal standards applied to their terminations depending upon the court in which they filed their claims" (Pet.6) is a gross distortion of the superior court's ruling.

B. The Petition Overstates the Significance of the Superior Court's Order.

Despite stating that the importance of the issues raised by the Petition cannot be overstated, (Pet.5), Bank of America proceeds to overstate the issues' importance to the point of absurdity. The superior court's ruling involved the Bank's right to breach employment contracts with officers under the National Bank Act. The court did not consider whether Hasenstab was an officer for purposes of engaging in bank-related business. Petitioner's statement that all business transactions requiring officer approval would be subject to rescission or ultra vires challenge, (Pet.7), is pure hysteria. By no stretch of the imagination did the superior court's ruling have any such effect.

To enjoy the benefits of the National Bank Act, a bank must comply with its requirements. Termination by someone other than the board of directors, or executive committee of the board, does not extinguish the employee's status as an "officer." It means only that the bank may not rely on the National Bank Act as a defense in the termination of the officer.

C. Since the Majority of Real Party's Claims Relate to his Hiring, rather than his Firing, the National Bank Act does not Apply.

Real party's complaint states tort causes of action for misrepresentation, fraud, deceit and intentional and negligent infliction of emotional distress. These causes of action relate to defendant's misrepresentations to plaintiff that his employment was guaranteed for a minimum of two years; that defendant would fully perform its obligations; that defendant would not deal with plaintiff arbitrarily, unlawfully, or in bad faith; that plaintiff could reasonably expect to earn commissions of several hundred thousand dollars; and that plaintiff could rely on defendant's cooperation and assistance. Defendant misrepresented the availability of product for plaintiff to market, the number and quality of clients interested in purchasing the product, and the current success of the Special Investments Group. In reliance on these representations, plaintiff was induced to leave secure employment to work for Bank of America.

Several courts have considered the question of whether a terminated officer's tort claims are also preempted when the National Bank Act is held to preempt

contract claims. Two state appellate decisions have allowed the employee to proceed on tort claims even though the contract claims were preempted by the National Bank Act. The tort claims in *Kozlowsky v. Westminister National Bank,* 6 Cal. App.3d 593, 86 Cal.Rptr.52 (1970) consisted of deceit and interference with contractual relations. Kozlowsky alleged that he had relied on a representation regarding the owner of controlling stock in the bank in leaving his former employment. Because the representation was a material fact which induced plaintiff to change his position, the court granted him an opportunity to prove it at trial. *Id.* at 598. *Kozlowsky* did not discuss in detail whether the tort claims were barred by the National Bank Act.

In *Rohde v. First Deposit National Bank,* 497 A.2d 1214 (N.H. 1985), plaintiff alleged tort claims for negligent misrepresentation and deceit arising out of an express promise of three-year employment. The New Hampshire Supreme Court held that there was no preemption under the Act for "tort claims arising out of [defendants'] conduct during the negotiation of such contract under theories of inducement or detrimental reliance." *Id.* at 1216.

The courts which have held tort claims preempted have done so with minimal analysis of the reasons therefor. In *Mackey v. Pioneer National Bank,* 867 F.2d 520 (9th Cir. 1989), the court dismissed plaintiff's tort claims for negligent misrepresentation and interference with business relationships, without discussing the underlying basis for such claims except to say that they arose "from his being forced to resign." *Id* at 522. In finding that there was no distinction to be made between tort and contract claims under the National Bank Act, the court stated that:

> it would make little sense to allow state tort claims to proceed, where a former bank officer's contract claims are barred by Section 24 (Fifth). The effect would be to substitute tort for contract claims, thus subjecting the national bank to all the dangers attendant to dismissing an officer. The purpose of the provision in the National Bank Act was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust.

Id. at 526.

The present case also does not allege tort claims challenging wrongful dismissal. Instead, as in *Kozlowsky* and *Rohde*, Hasenstab's claims arise out of express representations made during the *negotiation* of his contract which *induced* him to leave secure employment. Thus, the claims concern petitioner's actions while hiring Hasenstab, rather than while firing him. As such, this case is distinguishable from *Mackey*, which concerned tort claims arising from Mackey's being forced to resign.

Allowing Hasenstab to proceed with his tort claims would not hinder the power of a national bank to dismiss an officer. A national bank would still be able to dismiss officers immediately to protect the safety and integrity of the bank. The bank's reasons for such dismissal would not be questioned. Rather, the bank's actions in hiring an officer would be questioned. If the bank committed fraud in inducing an officer to leave secure employment to work for the bank, the bank should be subjected to liability for that fraud. To rule otherwise would give national banks a license to commit fraud.

Thus, since the majority of the claims, as well as the evidence at trial, will concern Real Party's hiring and not firing, the overall impact of any decision by the Supreme Court will be minimal. It would be a waste of this Court's time to grant a writ of certiorari on a relatively insignificant issue in this case.

D. The Decision in this Case Affects the Litigants only, has no Precedential Authority, and thus does not Warrant Review by this Court.

The opinion of the Court of Appeal consisted of one sentence denying Bank of America's petition for writ of mandate. (Pet.app.B). There was no narrative included with the decision and it was unpublished. Thus, only the litigants will be affected by the opinion.

In addition, the issue of whether the board of directors of a national bank can delegate authority to terminate an officer is presently pending before the California Supreme Court. *See Wells Fargo Bank v. Superior Court,* 218 Cal. App. 3d 329, *depublished* at 267 Cal. Rptr. 49 (1990). The decision in *Wells Fargo* will resolve many of the issues raised in this case by petitioner and will have far greater impact on banks in California. It would therefore be premature for this Court to rule on this issue since the California Supreme Court soon may resolve the same issues presented by Bank of America's Petition.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied. The ruling of the superior court was consistent with federal and state decisions in requiring the board of directors, or an executive committee of the board, to make the decision to terminate an officer. In addition, since the majority of Real Party's claims arise out of his hiring, rather than his firing, any decision by this Court will have a minimal impact on this case. The opinion of the Court of Appeal was unpublished and will have no precedential effect. Finally, the issues raised by the Petition are presently before the California Supreme Court and any action by this Court therefore would be premature.

DATED: January 18, 1991

BIANCO, BRANDI & JONES

BY: STEPHEN M. MURPHY
Attorney for Real Party In Interest

No. 90-1007

(3)

In The

Supreme Court of the United States

October Term, 1990

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

v.

SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

(GEORGE WALTERS, Real Party in Interest.)

Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Bank Act preempts claims of misrepresentation arising out of the hiring of an officer.

2. Whether the National Bank Act preempts tort causes of action unrelated to the term of an officer's employment.

3. Whether the National Bank Act preempts contract causes of action unrelated to the term of an officer's employment.

4. Whether the National Bank Act allows banks to breach express and implied contracts relating to the term of an officer's employment when the officer is terminated by someone other than the board of directors.

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Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District

BRIEF IN OPPOSITION

Real party in interest George Walters respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the California Court of Appeal, First Appellate District, filed on July 17, 1990.

STATEMENT OF THE CASE

Real party in interest George Walters is a securities broker. Before joining Bank of America, he enjoyed an

increasingly successful career at Bateman Eichler, Hill Richards. He became one of the top producers of limited partnerships and in his last year earned approximately $100,000.

In 1985 he was contacted by Terry Roussel, director of the Special Investment Group ("SIG") at Bank of America. Roussel made numerous representations to Walters to induce him to work for SIG as a salesman of limited partnerships. These representations included statements that there were sufficient clients and product, that Walters would earn hundreds of thousands of dollars and that he would be employed a minimum of two years.

Based on these representations, Walters left Bateman Eichler, Hill Richards and began work for SIG. During the thirteen months Walters worked for SIG, there was virtually no product to sell. Instead of earning hundreds of thousands of dollars he earned only his base salary of $64,000. He also learned that many of Roussel's representations were untrue. Walters was never told that his lofty title of vice president subjected his employment to the National Bank Act or that he was employed at the pleasure of the board of directors.

In December 1986 SIG was closed by Clyde Claus, an executive vice president. Walters was terminated in February 1987 by vice president Brenda Thomas, allegedly at the direction of Claus, when he refused to sign a release. The board of directors did not participate in or ratify the termination.

SUMMARY OF ARGUMENT

The decision of the Superior Court is consistent with federal and state court precedent in requiring the board of directors, or an executive committee of the board, to make the decision to terminate an officer under the National Bank Act. In any event, since this case involves numerous contract and tort issues unrelated to the National Bank Act, the overall impact of any ruling by this Court will be minimal.

The decision of the Court of Appeal upholding the Superior Court consisted of one sentence and was unpublished. The decision therefore will have no precedential effect and does not justify this Court's involvement. Finally, the issues raised by the Petition are presently before the California Supreme Court so that any action by this Court will be premature.

REASONS FOR DENYING THE WRIT

A. The Trial Court's Ruling is Consistent with the Majority of Federal and State Court Decisions.

Several courts have ruled that an officer is not subject to the "at pleasure" provision of the National Bank Act unless the decision to terminate was made by the board of directors. In view of the drastic effect of the Act in allowing banks to breach contracts, both express and implied, these rulings are sound. The act was intended, not to give national banks the unrestricted right to breach its express contracts, but to allow banks to remove quickly any officer whose continued employment

"threatens immediate ruin to the institution." *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896). Requiring the board of directors to make the decision to terminate ensures that the termination is so significant to the financial integrity of the bank that the decision is made by the highest level of management.

In *Wiskotoni v. Michigan Nat. Bank-West*, 716 F.2d 378, 38 (6th Cir.1983), the court stated:

> The terms of section 24 (Fifth) require that officers be appointed and dismissed by a national bank's board of directors. Wiskotoni was neither appointed nor dismissed by the Bank's board. Wiskotoni was hired by . . . [the] president of the Bank. The decision to terminate was made by . . . the successor president of the Bank. . . . [T]he board . . . took no official action until . . . when on the eve of oral argument on this issue before the district court, it passed a resolution purportedly ratifying Wiskotoni's dismissal. . . . For these reasons Wiskotoni was not an officer of the Bank for purposes of the National Bank Act.

Wiskotoni was followed by the Oregon Court of Appeal in *McWhorter v. First Interstate Bank*, 81 Or. 132, 724 P.2d 877 (1986), which observed that the

> authority to hire and fire officers of national banks is *not* simply a matter of corporate organization; it is a matter which Congress has deemed sufficiently important to regulate by statute.

Id. at 135, 724 P.2d at 879. The court further noted:

> Section 24 (Fifth) explicitly confers the responsibility for the hiring and dismissal of officers *on the board of directors*. Other provisions of the

> National Banking Laws make it clear that Congress knows how to manifest its intent about what powers are exercisable only by the board and what powers may be exercised by subordinate entities. *See, e.g.*, 12 U.S.C. § 24, (Seventh) ("board of directors *or duly authorized officers or agents*"). [Emphasis added]. Defendant's argument rests on the premise that the board may divest itself of a duty that Congress has placed on it by enacting a by-law which makes no reference to that duty but which, if there were no statute, *might* be sufficient under general corporation law principles to confer hiring and firing authority on the president.

Id.

In *Mackey v. Pioneer National Bank*, 867 F.2d 520 (9th Cir. 1989), a case relied on by Bank of America, the plaintiff was terminated by unanimous vote of the executive committee of the Board of Directors. The full board subsequently ratified that decision. The Ninth Circuit distinguished *McWhorter, supra*, by stating:

> there is no question that Mackey's firing was accomplished by the Board of Directors acting through its Executive Committee, . . . and not by the individual action of Pioneer's President.

Id. at 525.

In allowing an executive committee of the board to terminate officers with board ratification, *Mackey* provides a middle ground between the board itself and officers who have been delegated the responsibility to terminate. Although the executive committee is not the board itself, it is comprised of board members. Thus, at least some of the highest decision makers in the bank are participating in the decision.

Despite Petitioner's arguments to the contrary, the superior court's decision is consistent with *Mackey v. Pioneer National Bank*, 867 F.2d 520 (9th Cir. 1989). The superior court denied Petitioner's motion for summary adjudication because there was no evidence that "the termination of plaintiff was approved or ratified by the Board of Directors or an Executive Committee of the Board." (Pet.app.A.) Since *Mackey* was decided by the Ninth Circuit, the highest federal court in California, Real Party has been granted no more power by suing in state court than he would have had in federal court. Petitioner's claim that "officers discharged from the same bank in California would have different legal standards applied to their terminations depending upon the court in which they filed their claims" (Pet.6) is a gross distortion of the superior court's ruling.

B. The Petition Overstates the Significance of the Superior Court's Order.

Despite stating that the importance of the issues raised by the Petition cannot be overstated, (Pet.5), Bank of America proceeds to overstate the issues' importance to the point of absurdity. The superior court's ruling involved the Bank's right to breach employment contracts with officers under the National Bank Act. The court did not consider whether Walters was an officer for purposes of engaging in bank-related business. Petitioner's statement that all business transactions requiring officer approval would be subject to rescission or ultra vires challenge, (Pet.7), is pure hysteria. By no stretch of the imagination did the superior court's ruling have any such effect.

To enjoy the benefits of the National Bank Act, a bank must comply with its requirements. Termination by someone other than the board of directors, or executive committee of the board, does not extinguish the employee's status as an "officer." It means only that the bank may not rely on the National Bank Act as a defense in the termination of the officer.

C. Since the Majority of Real Party's Claims Relate to his Hiring, rather than his Firing, the National Bank Act does not Apply.

Real party's complaint states tort causes of action for misrepresentation, fraud, deceit and intentional and negligent infliction of emotional distress. These causes of action relate to defendant's misrepresentations to plaintiff that his employment was guaranteed for a minimum of two years; that defendant would fully perform its obligations; that defendant would not deal with plaintiff arbitrarily, unlawfully, or in bad faith; that plaintiff could reasonably expect to earn commissions of several hundred thousand dollars; and that plaintiff could rely on defendant's cooperation and assistance. Defendant misrepresented the availability of product for plaintiff to market, the number and quality of clients interested in purchasing the product, and the current success of the Special Investments Group. In reliance on these representations, plaintiff was induced to leave secure employment to work for Bank of America.

Several courts have considered the question of whether a terminated officer's tort claims are also preempted when the National Bank Act is held to preempt

contract claims. Two state appellate decisions have allowed the employee to proceed on tort claims even though the contract claims were preempted by the National Bank Act. The tort claims in *Kozlowsky v. Westminister National Bank*, 6 Cal. App.3d 593, 86 Cal.Rptr.52 (1970) consisted of deceit and interference with contractual relations. Kozlowsky alleged that he had relied on a representation regarding the owner of controlling stock in the bank in leaving his former employment. Because the representation was a material fact which induced plaintiff to change his position, the court granted him an opportunity to prove it at trial. *Id.* at 598. *Kozlowsky* did not discuss in detail whether the tort claims were barred by the National Bank Act.

In *Rohde v. First Deposit National Bank*, 497 A.2d 1214 (N.H. 1985), plaintiff alleged tort claims for negligent misrepresentation and deceit arising out of an express promise of three-year employment. The New Hampshire Supreme Court held that there was no preemption under the Act for "tort claims arising out of [defendants'] conduct during the negotiation of such contract under theories of inducement or detrimental reliance." *Id.* at 1216.

The courts which have held tort claims preempted have done so with minimal analysis of the reasons therefor. In *Mackey v. Pioneer National Bank*, 867 F.2d 520 (9th Cir. 1989), the court dismissed plaintiff's tort claims for negligent misrepresentation and interference with business relationships, without discussing the underlying basis for such claims except to say that they arose "from his being forced to resign." *Id* at 522. In finding that there was no distinction to be made between tort and contract claims under the National Bank Act, the court stated that:

> it would make little sense to allow state tort claims to proceed, where a former bank officer's contract claims are barred by Section 24 (Fifth). The effect would be to substitute tort for contract claims, thus subjecting the national bank to all the dangers attendant to dismissing an officer. The purpose of the provision in the National Bank Act was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust.

Id. at 526.

The present case also does not allege tort claims challenging wrongful dismissal. Instead, as in *Kozlowsky* and *Rohde*, Walters' claims arise out of express representations made during the *negotiation* of his contract which *induced* him to leave secure employment. Thus, the claims concern petitioner's actions while hiring Walters, rather than while firing him. As such, this case is distinguishable from *Mackey*, which concerned tort claims arising from Mackey's being forced to resign.

Allowing Walters to proceed with his tort claims would not hinder the power of a national bank to dismiss an officer. A national bank would still be able to dismiss officers immediately to protect the safety and integrity of the bank. The bank's reasons for such dismissal would not be questioned. Rather, the bank's actions in hiring an officer would be questioned. If the bank committed fraud in inducing an officer to leave secure employment to work for the bank, the bank should be subjected to liability for that fraud. To rule otherwise would give national banks a license to commit fraud.

Thus, since the majority of the claims, as well as the evidence at trial, will concern Real Party's hiring and not firing, the overall impact of any decision by the Supreme Court will be minimal. It would be a waste of this Court's time to grant a writ of certiorari on a relatively insignificant issue in this case.

D. The Decision in this Case Affects the Litigants only, has no Precedential Authority, and thus does not Warrant Review by this Court.

The opinion of the Court of Appeal consisted of one sentence denying Bank of America's petition for writ of mandate. (Pet.app.B). There was no narrative included with the decision and it was unpublished. Thus, only the litigants will be affected by the opinion.

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DATED: January 18, 1991

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